KENNETH G. HAUSMAN (Bar No. 57252)
kenneth.hausman@arnoldporter.com
DANIEL B. ASIMOW (Bar No. 165661)
daniel.asimow@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Telephone: 415.471.3100
Facsimile: 415.471.3400

[*additional counsel listed on signature page*]

Attorneys for Defendant THE OAKLAND RAIDERS, a California limited partnership

JOHN E. HALL (Bar No. 118877)
jhall@cov.com
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
Telephone: 202.662.6000
Facsimile: 202.662.6291

[*additional counsel listed on signature page*]

Attorneys for Defendants THE NATIONAL FOOTBALL LEAGUE and all NFL Clubs other than The Oakland Raiders

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY OF OAKLAND,

Plaintiff,

vs.

THE OAKLAND RAIDERS, a California limited partnership; ARIZONA CARDINALS FOOTBALL CLUB LLC; ATLANTA FALCONS FOOTBALL CLUB, LLC; BALTIMORE RAVENS LIMITED PARTNERSHIP; BUFFALO BILLS, LLC; PANTHERS FOOTBALL, LLC; THE CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS FOOTBALL COMPANY LLC; DALLAS COWBOYS FOOTBALL CLUB, LTD; PDB SPORTS, LTD; THE DETROIT LIONS, INC.; GREEN BAY PACKERS, INC.; HOUSTON NFL HOLDINGS, LP; INDIANAPOLIS COLTS, INC.; JACKSONVILLE JAGUARS, LLC; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; CHARGERS FOOTBALL COMPANY, LLC; THE RAMS FOOTBALL COMPANY, LLC; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL, LLC; NEW ENGLAND PATRIOTS LLC; NEW ORLEANS

Case No.: 3:18-cv-07444-JCS

Action Filed: December 11, 2018

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Date: June 7, 2019
Time: 9:30 a.m.
Place: Courtroom G, 15th Floor
Judge: Hon. Joseph C. Spero

LOUISIANA SAINTS, LLC; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS LLC; PHILADELPHIA EAGLES, LLC; PITTSBURGH STEELERS LLC; FORTY NINERS FOOTBALL COMPANY LLC; FOOTBALL NORTHWEST LLC; BUCCANEERS TEAM LLC; TENNESSEE FOOTBALL, INC.; PRO-FOOTBALL, INC.; and THE NATIONAL FOOTBALL LEAGUE,

Defendants.

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INTRODUCTION

In its Opposition to Defendants' Motion to Dismiss (ECF 48, "Opp."), Plaintiff City of Oakland abandons the antitrust claim asserted in its Complaint. No longer does the City argue that Defendants improperly conspired to permit the Raiders to relocate. Instead, the City now challenges the NFL's 32-team structure, arguing that the antitrust laws require the League, a joint venture, to increase the number of its member clubs. The City's new theory seems to be that if there were more NFL teams, the City could benefit because one of those additional teams might decide to play in the fifty-three year old Oakland Coliseum (or some other hypothetical stadium to be located elsewhere in Oakland). Such a claim could be asserted by any city in America: if there were enough NFL clubs, smaller and smaller cities and less and less adequate facilities might succeed in landing a team. Local hotels, parking lots and watering holes might benefit as well. But such speculative and indirect potential benefits are far too remote to support antitrust standing. Moreover, even if the City had standing, the claim would fail as a matter of law. *Mid-South Grizzlies v. Nat'l Football League*, 720 F.2d 772 (3d Cir. 1983), squarely considered and rejected a claim (by an actual football team) that the NFL had an obligation to admit additional members. The City ignores this case even though it was cited in Defendant's Opening Brief. ECF 41 ("Mot.") at 12.

The antitrust claim actually asserted in the Complaint, premised on a challenge to the NFL's decision to permit the Raiders to relocate, fails for all of the reasons set forth in the Opening Brief. Any harm allegedly suffered by the City due to the Raiders' relocation was the result of an increase in competition, not a decrease. Whether or not it owns a partial interest in the Coliseum, the City lacks standing to assert such a claim. The substantive elements of a price fixing or boycott claim have not been pled. And the market definition in the Complaint remains improperly defined in terms of customers or suppliers, rather than goods or services.

As for its breach of contract claim based on the NFL's Relocation Policy, the City continues to assert that this set of discretionary factors should be deemed a binding contract because the Relocation Policy somehow is part of the NFL Constitution. This assertion is contradicted by the documents themselves: the NFL Constitution contains an express provision on amendment, and there is no claim that the Relocation Policy was adopted under that provision. Furthermore, even if

the Policy were a contract, the City does not and cannot establish that it is a third party beneficiary with standing to enforce the document. The City wrongly contends that interpretation of the Relocation Policy is a "question[] of fact for the trier of fact to consider." Opp. at 2. But contract interpretation, including determining whether a contract makes a third party an intended beneficiary, is a question of law for the court to determine, at least in the absence of a credibility dispute regarding parol evidence. Where the terms of the asserted contract are presented, the court may interpret and apply those terms in deciding a motion to dismiss. Here, the language of the Policy, as well as the allegations that the City makes about the circumstances under which the Policy was adopted, confirm that the NFL did not intend to bestow third party beneficiary status on municipalities or other constituencies that may support or oppose a proposed franchise relocation. Finally, because there is no assertion that Defendants failed to consider the factors set forth in the Relocation Policy in approving the Raiders' relocation, the City fails to allege a breach of the Policy.

The City's derivative claims for declaratory relief, quantum meruit and unjust enrichment fall alongside its primary antitrust and contract claims. The Complaint should be dismissed.

I. THE CITY'S ANTITRUST CLAIMS FAIL AS A MATTER OF LAW.

The Complaint contains two substantive antitrust claims—a group boycott/refusal to deal claim (Counts I and II) and a price-fixing claim (Count III). The first asserts that the NFL clubs refused to deal with the City by giving the Raiders permission to move. The second asserts that the NFL clubs somehow fixed the price of "new and renovated stadia." Complaint for Damages (ECF 1) ("Cplt.") ¶122. Faced with established law demonstrating that neither of these theories states a viable antitrust claim, the City seeks to recast its complaint and now argues that the NFL's 32-team structure itself violates the antitrust laws. *See, e.g.*, Opp. at 5.

The City's new theory fares no better than its old because, among other things, the City lacks standing to bring such an antitrust challenge. The City is not a football team that has sought admission to the NFL. Nor can the City establish that it would be any better off if the NFL had 33 teams (or 35 (*see* Opp. at 5), or even 100), because there are no facts alleged in the Complaint, and no basis for alleging, that one of those hypothetical new teams would choose to play in Oakland

after the Raiders move to Las Vegas.

A. Even If The City's Complaint Were Based On A Challenge To The NFL's Structure Of 32 Teams, It Would Fail To State A Claim.

1. The City Fails To Allege Injury-In-Fact From The NFL's 32-Team Structure.

The first flaw in the City's new antitrust theory is that the Complaint does not allege "injury-in-fact" arising out of the NFL's 32-club structure. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (injury-in-fact is required element of antitrust claim); *Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1255 (9th Cir. 2008) ("For Article III purposes, an antitrust plaintiff establishes injury-in-fact when he has suffered an injury which bears a causal connection to the alleged antitrust violation."). The Complaint fails to allege how, if at all, *the City* has been injured by the current League structure or why it would have avoided the harm it claims (lost tax revenues and the loss of its "investments" in the Raiders) if the NFL had admitted an additional team. The Complaint does not allege that the City sought to form a 33rd NFL team or that if there were a 33rd team it would have played in Oakland instead of another city. The absence of any facts linking the City's alleged harm to the NFL's structure of 32 teams is fatal to its new antitrust theory at the threshold. *See generally Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("alleged harm must be actual or imminent, not conjectural or hypothetical" and "the litigant must satisfy the causation and redressability prongs of the Art. III minima by showing that the injury fairly can be traced to the challenged action") (internal quotation and citation omitted).

2. The City Lacks Standing To Challenge The NFL's 32-Team Structure.

Even if the City had alleged injury-in-fact from the 32-team structure, it would nevertheless lack standing to sue because it is not the "proper party to bring a private antitrust action." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n. 31 (1983).

a. The City Lacks Standing To Assert Claims For Alleged Injuries To Its Sovereign Interests.

As Defendants explained in their Opening Brief, the City can sue only for "injuries to its

commercial interests," not its interests as a sovereign. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972); Mot. at 9-10. The City argues that it is suing not for harm to its sovereign interests, but rather for the loss of "tax revenues and other income derived from economic activity generated by the presence of the Raiders, as well as Oakland's lost investments in the team and monies expended in efforts to keep the Raiders." Opp. at 10 & n.6. None of these alleged losses, even if proved, would afford the City standing.

First, the City argues that "U.S. Supreme Court Justice Ginsburg" recognized that *Hawaii* allows recovery for lost tax revenues. Opp. at 10. The City is wrong, and not just because the language it cites is from Justice Breyer's *dissent* in *Hemi Group, LLC v. City of New York, LLC*, 559 U.S. 1 (2009), rather than any opinion by Justice Ginsburg. In *Hemi Group*, New York City alleged that the participants in a RICO conspiracy had engaged in mail and wire fraud specifically to prevent the city from collecting taxes due on cigarettes sold by the defendant. In his dissent, Justice Breyer noted that this tax loss "differ[ed] significantly" from the loss at issue in *Hawaii*; the loss in *Hawaii* was "both more general and derivative of harm to individual businesses," *Id.* at 1001.

Here, the injury alleged by the City is "general and derivative" as in *Hawaii*; it is nothing like the tax evasion scheme in *Hemi*. *See* Mot. at 9-10. The City is, at best, just like any other government entity that loses tax revenues when a business within its borders is injured by an alleged antitrust violation. Mountain View could not have sued Microsoft when Netscape (based in Mountain View) was allegedly foreclosed from the Internet browser business and suffered lost profits (and paid less taxes) as a result. Nor can the City sue based on reduced economic activity within its borders.

Second, the City's "lost investments in the team and monies expended in efforts to keep the Raiders" in Oakland are not sufficient to afford standing. The Complaint does not link these "investments" to the City's efforts to attract a team other than the Raiders that might benefit from changes to the NFL's 32-team structure. Regardless, the City does not have standing because it is not complaining that it was harmed by an antitrust violation that inflated the prices that it paid in a "commercial transaction." *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 341–42 (1979) ("The phrase 'commercial interests' was used [in *Hawaii*] as a generic reference to the interests of the State of

Hawaii as a party to a commercial transaction."). Instead, the City is claiming losses based on purported municipal investments in business development, a claim foreclosed by Ninth Circuit precedent. *See City of Rohnert Park v. Harris*, 601 F.2d 1040, 1044 (9th Cir. 1979) (rejecting claim that "raising and disbursing the special assessment funds used to improve the commercial zone" is a proprietary interest sufficient to confer antitrust standing on a municipality alleging foreclosure of a business within that zone).[1]

b. The City's Alleged Injuries Are Indirect.

Any injury suffered by the City as a result of the NFL's 32-team structure is also too indirect to confer standing.[2] Here, the only party "directly" affected by an agreement to prescribe the number of teams would be a team that sought to join the NFL joint venture. Any harm to the City from such an agreement is derivative of that harm—without injury to the hypothetical additional team, the City would not be injured. But derivative harm does not afford standing. *See, e.g.*, *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 703 (9th Cir. 2001) (health plans that paid higher costs to treat smokers lacked standing to challenge alleged conspiracy among tobacco companies to suppress safer cigarettes because any insurer's harm was derivative of that suffered by smokers).

The loss of stadium rents is precisely the sort of indirect or derivative harm that has consistently been held insufficient to confer standing. For example, the Ninth Circuit held in *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 148 (9th Cir. 1989), that a plaintiff whose "only direct, identifiable damages are those of a landlord whose rent has not been paid" lacks standing. "Mere injury as a landlord or lessor entitled to royalties would not by itself be the kind of

[1] The cases cited (Opp. at 9) by the City (*Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 51 (5th Cir. 1976) and *Jerrold Elecs. Corp. v. Wescoast Broad. Co.*, 341 F.2d 653, 665 (9th Cir. 1965)) do not address standing at all, let alone the standing of a municipality to sue based upon municipal investments in business development.

[2] Contrary to the City's claims that directness issues must be reserved for the finder of fact, courts routinely dismiss complaints where the harm alleged in the complaint is indirect. *See, e.g.*, *Kloth v. Microsoft Corp.*, 444 F.3d 312, 325 (4th Cir. 2006) (affirming dismissal where plaintiffs' harm was indirect and speculative); *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 28 (D.C. Cir. 1987) (affirming dismissal where "the harm to plaintiffs is one step removed" from harm to direct victim); *Haff v. Jewelmont Corp.*, 594 F. Supp. 1468, 1477 (N.D. Cal. 1984) (granting motion to dismiss antitrust claims where harm was indirect).

injury to competition that the antitrust laws are designed to prevent. The requirement that the alleged injury be related to anticompetitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors." *Id.* (internal quotation marks omitted).

Here, the City is not even the "landlord whose rent has not been paid"; its alleged injury is even more remote. The Complaint acknowledges that the City is only an "indirect owner" of the Coliseum (Cplt. ¶ 17); the Opposition acknowledges (Opp. at 8) that the stadium has been leased to "the Oakland-Alameda County Financing Corporation, which, in turn has assigned its rights under that lease to the [Oakland-Alameda County Coliseum Authority] ("OACCA")." The City does not and cannot allege that it receives or would receive rent or other payments directly from the Raiders or any other team that might use the Coliseum. And the OACCA is not a plaintiff here.

The City claims that the *Raiders II* decision "squarely addressed . . . injury to a Host City from Defendant's anticompetitive conduct" and found standing. Opp. at 11 (citing *Los Angeles Memorial Coliseum Commission v. National Football League*, 791 F.2d 1356, 1364 (9th Cir. 1986)). That is not correct. In that case, having *prevailed* in the economic competition for the Raiders' tenancy, a stadium commission (the Los Angeles Memorial Coliseum Commission) challenged a restriction on the Raiders' ability to relocate. Nothing in that decision suggests that the City of Los Angeles, as a "Host City," would have had standing to bring a claim for harm suffered by the L.A. Coliseum Commission, or that the City is "a competitor in the market in which competition was restrained directly and foreseeably" by a structure of 32 teams. Nor does that decision support a claim of standing by any government entity, whether city or stadium commission, that *lost* a free market competition for an NFL's club tenancy.

3. An Antitrust Challenge To The NFL's 32-Team Structure Would Fail As A Substantive Matter.

Although it tries to recast its Complaint as a challenge to the NFL's 32-team structure, the City's brief ignores the only case to address a claim that the NFL had an obligation to admit an additional club into its joint venture, *Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3d Cir. 1983).

In *Mid-South Grizzlies*, the Third Circuit squarely rejected a claim that the NFL was required by the antitrust laws to admit as an additional member a team that had competed in the World Football League. Analyzing the claim under the antitrust rule of reason, the court rejected the claim because the Grizzlies' exclusion did not harm competition:

> As to competition with NFL members in the professional football market, including the market for sale of television rights, the exclusion was patently pro-competitive, since it left the Memphis area, with a large stadium and a significant metropolitan area population, available as a site for another league's franchise, and it left the Grizzlies' organization as a potential competitor in such a league.

720 F.2d at 786.[3] In the same way, the NFL's current structure of 32 teams does not foreclose competition. It leaves Oakland available as a home for another professional football team, including an existing NFL team, a CFL team, an XFL team, or a team in some future league that wishes to compete with the NFL.

In addition, the *Mid-South Grizzlies* court rejected the claim that the Grizzlies' exclusion reduced competition in the "raw material market" for players and coaches. In an analysis equally applicable to alleged harm to cities, the court noted that the restriction "in no way restrained them from competing for players by forming a competitive league." *Id*. at 787.

The Ninth Circuit reached a similar result in *Seattle Totems Hockey Club, Inc. v. National Hockey League*, citing *Mid-South Grizzlies* to affirm dismissal of antitrust claims by a team denied admission to the NHL. *See* 783 F.2d 1347 (9th Cir. 1986). As in *Mid-South Grizzlies*, "Without an NHL franchise Seattle constituted a potential WHA site, and the denial, if any, of an NHL franchise under these circumstances did not injure competition." *Seattle Totems*, 783 F.2d at 1350.

B. The City's Allegations Based On The NFL's Refusal To Block The Raiders From Moving To Las Vegas Fail To State A Claim.

Defendants established in their Opening Brief that the decision to allow the Raiders to relocate could not violate the antitrust laws. The City's response to the standing (sovereign interests

[3] The City's erroneous claim that the *per se* rule applies here (Opp. at 12 n.7) is at odds with the approach taken by the *Mid-South Grizzlies* court, and is foreclosed by the Supreme Court's decision in *American Needle*, *Raiders I*, and other precedent. *See* Mot. at 12 (collecting cases).

and indirectness) arguments are addressed above; Defendants briefly address below the City's inadequate responses to the antitrust injury, market definition, and substantive claims arguments.

1. The City Does Not Allege Antitrust Injury.

The City's Opposition ignores the fundamental argument in Defendants' Opening Brief: that the departure of a team due to free and open competition is not and does not cause antitrust injury. The City relies heavily on *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381 (9th Cir. 1984) ("*Raiders I*"), but that decision does not address a situation in which a team was permitted to move. Antitrust injury cannot be found where competition is facilitated by permitting movement.[4]

The inapplicability of *Raiders I* is confirmed by the language that the City quotes, claiming that Defendants "acted as a 'classic cartel' to 'extract excess profits.'" Opp. at 7, citing 726 F.23d at 1392. Whatever that may mean here, no "excess profits" have been extracted *from Oakland.* The City will not pay for a new or renovated stadium; nor will it pay any relocation fee. The City's alleged harm comes from the Raiders' departure to a city where the economics were more favorable. That is not antitrust injury for the unrefuted reasons described in the Opening Brief.

2. The City Does Not Adequately Allege A Relevant Market.

The City concedes (Opp. at 12-13) that the market of "Host Cities" proposed in its Complaint is distinct from the market of "stadia offering their facilities to NFL teams" approved by the Ninth Circuit in *Raiders I*, 726 F.2d at 1391. And, as set forth in the Opening Brief, a market must consist of goods or services that can be bought or sold, not the entities who do the buying or selling. *See, e.g., Morgan, Stand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1489 (9th Cir. 1991). The City fails to appreciate the difference. It asserts that "competition between Las Vegas and Oakland for the Raiders" demonstrates that "there must be a market for Host Cities" (Opp. at 12), but this again conflates the competitors (which might be cities, counties, stadium authorities or the like) with the product (apparently, in this example, stadium tenancies).

Even if the market is recast as stadium services for NFL teams, such a market would not be

[4] The cases cited by the City (Opp. at 5-6) addressing agreements to limit output are not on point, because the City's harm is not caused by the NFL's 32-team structure.

plausible. *See, e.g., Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1121-22 (9th Cir. 2018). The Court may take judicial notice of the fact that many stadiums offer services not only to professional football teams, but also to professional baseball teams, college football and baseball teams, teams in other sports, and other forms of entertainment. The Oakland Coliseum continues to host the Oakland Athletics. The Los Angeles Coliseum has hosted at one time or another not only professional football but also college football teams, the Olympics, and professional baseball and soccer teams. It is incumbent upon the City to explain why the relevant market does not include stadium services for other sports or forms of entertainment, but the Complaint does not even attempt to offer such an explanation.[5]

3. The City Does Not Adequately Allege A Group Boycott Or Refusal To Deal.

The City's Opposition does not directly address the key argument in Defendants' Opening Brief: that no group boycott is alleged because there is no allegation that any team other than the Raiders entered into an agreement not to play in Oakland. Mot. at 15.[6] The decision of other NFL teams not to block the Raiders' relocation does not turn their consent into a group boycott. *See, e.g.*, *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970) (consent of Commissioner of Baseball to firing of umpires by the American League did not convert American League's dismissal into a group boycott). The absence of a group boycott is confirmed by the fact that the City would be in exactly the same position if there were no Relocation Policy and any team

[5] The Complaint asserts that "a professional baseball team is not a substitute for a professional football team" (Cplt. ¶89), but that is not the issue. Rather, it is whether providing stadium services to (and receiving rent from) a baseball team is reasonably interchangeable with providing stadium services to a football team.

[6] The City argues that "Defendants have not offered Oakland another NFL team, and no NFL Club has even suggested it is willing to move to Oakland." Opp. at 14. But a lack of interest by other NFL clubs would not be surprising given the age of the Oakland Coliseum, as well as the fact that teams typically enter long-term leases (such as the 16-year lease that the Complaint alleges the Raiders entered into 1995, *see* Cplt. ¶47). Nowhere does the Complaint allege that any other NFL team is free of lease commitments or other obligations that would permit it to move or that the City even has attempted to enter into discussions with any other team concerning playing in Oakland. *Cf. St. Louis Convention & Visitors Comm'n v. Nat'l Football League*, 154 F.3d 851, 861-64 (8th Cir. 1998) (affirming judgment as a matter of law on antitrust claim where plaintiff "did not present evidence tending to show that there was even one other team besides the Rams that failed to bid on its lease because of the NFL rules…").

were free to move without the consent of the League or vote of the other clubs.

4. The City Does Not Adequately Allege Price Fixing.

The City's Opposition likewise fails to engage with the arguments in Defendants' Opening Brief regarding the price fixing claim. The City cites *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-223 (1940), for the proposition that an agreement to charge non-uniform prices can violate Section 1. But that case involved an agreement among conspirators on the prices they would pay to purchase gasoline from small providers; the fact that the agreed price would be a "fair going market price" (*id.*, 310 U.S. at 183), did not make it any less a price fixing conspiracy. *Id*. at 222 ("Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible."). Here, in contrast, the Complaint contains no allegation that NFL teams agreed on the stadium rent that they would pay anyone, let alone the rent that they would pay Oakland. As such, there is no agreement on prices to be paid (or charged) to Oakland (or any other city), and no price fixing conspiracy within the scope of Section 1.

II. THE CITY'S CONTRACT CLAIM FAILS AS A MATTER OF LAW.

In an attempt to defend its inadequately pleaded contract claim, the City relies on the trial court order in *St. Louis Regional Convention and Sports Complex Authority v. National Football League*¸ No. 1722-CC00976, 2017 WL 6885089 (Mo. Cir. Ct. Dec. 27, 2017), which denied a motion to dismiss a third party beneficiary claim under the NFL's Relocation Policy. As the City acknowledges, however, the order is not precedent. Opp. at 17 n.13. And, because the order contains no analysis or reasoning, it lacks persuasive value, even setting aside the fact that it is incorrect as a matter of Missouri law. *See* Mot. at 21 n.14. The breach of contract claim asserted here should be dismissed for three separate reasons: (1) the Policy is not a contract, (2) the City is not an intended third party beneficiary, and (3) the City fails to plead a breach of the Policy.

A. The Relocation Policy Is Not A Contract.

As set forth in Defendants' Opening Brief, the portions of the Relocation Policy cited by the City at most constitute a list of factors that NFL clubs may consider in evaluating relocation applications. Even an explicit promise to consider a factor is too "amorphous" to "rise to the level of a contractual duty." *Ladas v. Cal. Stat. Auto. Ass'n*, 19 Cal. App. 4th 761, 771 (1993); *Prostar*

Wireless Grp., LLC v. Domino's Pizza, Inc., No. 3:16-05399-WHO, 2018 WL 6831026, at *9 (N.D. Cal. Dec. 28, 2018). The Relocation Policy does not go as far as the documents at issue in *Ladas* and *Prostar*; it merely lists factors that *may* be considered. The City has no response and fails even to discuss these cases. Instead, it asserts that because the NFL Constitution gives the NFL Commissioner the right to "establish policy and procedure" in respect to the NFL Constitution and Bylaws, any such policy and procedure somehow itself becomes part of the NFL Constitution. From this false premise, the City argues that because the NFL Constitution is a contract, the Relocation Policy must be one as well.

In fact, the NFL Constitution is explicit that it may be amended only by the vote of three-quarters of the clubs (except for certain provisions that require a unanimous vote). *See* ECF 1-1 at 120 (Article XXV). The City does not and cannot allege that the Relocation Policy was adopted pursuant to Article XXV. The Relocation Policy is just what it says it is—a policy adopted by the Commissioner that the Commissioner unilaterally may change at any time. It does not become a part of the Constitution because the Commissioner promulgated it pursuant to power granted him by the Constitution, even if the Constitution itself might be deemed a contract between the member clubs. The City's argument is akin to saying that because the Presidency is established in Article II of the U.S. Constitution, any proclamation of the President is part of the U.S. Constitution. That is not how it works.

The City also appears to suggest that even if the Relocation Policy was not initially an enforceable contract, the City converted it into one by its purported reliance on the Policy. Reliance can cure some defects in contract formation, such as lack of consideration. *See, e.g.*, *Restatement (Second) of Contracts* §90 (1981). But even reliance by a party cannot make an illusory promise enforceable. *See, e.g., Glen Holly Entm't v. Tektronix, Inc.*, 352 F.3d 367, 381 (9th Cir. 2003).

B. The City Cannot Enforce The Relocation Policy As A Third Party Beneficiary.

Even if the Relocation Policy were a contract, the City would not be a third party beneficiary. The City argues that third party beneficiary status is a fact issue that cannot be resolved on a motion to dismiss. But third party beneficiary status is a question of contract interpretation, and contract interpretation ordinarily is a question for the court. *See, e.g., Hess v. Ford Motor Co.*, 27

Cal. 4th 516, 524 (2002).[7]

The California Supreme Court's recent decision in *Goonewardene v. ADP, LLC*, 6 Cal. 5th 817 (2019), made clear that spurious third party beneficiary claims may be terminated at the motion to dismiss or demurrer stage. To the extent that the City relies on contradictory case law predating *Goonewardene*, those efforts should be disregarded.[8] Under *Goonewardene*, a plaintiff asserting a third party beneficiary claim must satisfy three elements, both at the pleading stage and thereafter. At least two of these elements are absent here.

The second factor under *Goonewardene* is that the "motivating purpose of the contracting parties was to provide a benefit to the third party." *Id.*, 6 Cal. 5th at 830. The City does not meet that test. The "motivating purpose" of the Relocation Policy is set forth in the Policy itself: "to advance the interest of the League." Policy at 1. The City offers no argument as to how this language could be interpreted in a way that would show that the Policy's "motivating purpose" was to benefit not the League but a third party like Oakland.

Notwithstanding the Policy's plain language, the City claims that the Policy's adoption in the wake of the Ninth Circuit's *Raiders I* case shows that it was intended to benefit incumbent Host Cities by making relocation more difficult. As with the City's antitrust claim that blithely equates

[7] As set forth in the Opening Brief, New York law should govern the interpretation of the Relocation Policy because the Policy was issued from the NFL Office in New York and applied to clubs in multiple jurisdictions. *See* Mot. at 17 & n.10 (citing *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 542 (7th Cir. 1978) (Illinois law applied to Major League Baseball Agreement because agreement was adopted in Chicago but was to be performed in multiple states)). The Court need not resolve the question at this stage of the case because the third party beneficiary claim fails as a matter of law under both California and New York law.

[8] In any event, the pre-*Goonewardene* cases cited by the City provide no support for its position. Most reject third party beneficiary claims. *See Barragan v. Nationwide Mortg. LLC*, No. 12-cv-01618, 2012 WL 12895717, at *2 (C.D. Cal. Nov. 7, 2012) (granting motion to dismiss third party beneficiary claim; plaintiff failed to show "clear intent" that contracting parties intended to make plaintiff a third party beneficiary); *Deerpoint Grp., Inc. v. Agrigenix, LLC*, 345 F. Supp. 3d 1207, 1229 (E.D Cal. 2018) (declining to find as a matter of law that affiliate was third party beneficiary of a release); *Souza v. Westlands Water Dist.*, 135 Cal. App. 4th 879, 891 (2006) (rejecting as a matter of law claim that landowners were third party beneficiaries of agreement between water district and tenants); *Otay Land Co., LLC v. U.E. Ltd., L.P.*, 15 Cal. App. 5th 806, 852-59 (2017) (rejecting claim that defendants were third party beneficiaries of release). The one exception involved quite different factual circumstances. *See Serv. Emps. Int'l Union, Local 99 v. Options-A Child Care & Human Servs. Agency*, 200 Cal. App. 4th 869, 875 (2011) (member of general public could sue to enforce agreement under which agency agreed to hold open meetings and be subject to Brown Act).

permitting a team to move with preventing a team from moving, this argument ignores the context of *Raiders I*. In *Raiders I*, the NFL clubs *did* engage in collective action to prevent a move and were faced with an antitrust challenge. The Ninth Circuit suggested that "[t]o withstand antitrust scrutiny, *restrictions* on team movement should be more closely tailored to serve the needs inherent in producing the NFL 'product' and competing with other forms of entertainment." *Id.*, 726 F.2d at 1397 (emphasis added). The NFL sought to fashion criteria on which it could rely both to evaluate proposed franchise relocations and to defend decisions, like that involved in *Raiders I*, to prevent a club from relocating. The fact that the Policy was adopted after *Raiders I* thus only confirms the "motivating purpose" stated in the Relocation Policy itself: to advance the League's interests.[9]

Factor three under *Goonewardene* assesses the objectives and reasonable expectations of the contracting parties. The City does not explain why the NFL clubs would wish to render themselves subject to lawsuits by disgruntled cities or others unhappy with a permitted relocation. To the contrary, as explained in the Opening Brief, the Relocation Policy was adopted by the NFL to *avoid* litigation in the future. *See* Mot. at 20-21. The City has no answer to this point. Rather, the City simply asserts, without support, that third party enforcement of the Relocation Policy is "reasonable." This case demonstrates that is not. It would mean that any relocation of a team would be subject to second guessing by cities or others that might weigh the discretionary factors set forth in the Relocation Policy differently from the weight assigned to them by the NFL clubs in the exercise of their business judgment. The purportedly contracting parties—the NFL clubs themselves—would not reasonably expect in this way to surrender their right to govern themselves.

C. The City Does Not Allege A Breach.

Even if the City could enforce the Relocation Policy as a contract, it has not alleged a breach. The City makes no claim that Defendants failed to follow the notice provisions of the Policy. *See* Opp. at 19. Rather, its claim boils down to the assertion that the twelve factors listed in the Policy warranted forcing the Raiders to remain in Oakland. But as explained in the Opening

[9] Furthermore, as discussed in the Opening Brief, the Relocation Policy addresses markets, not particular cities. A relocation to a different city within a market does not implicate the Policy. As a result, it cannot have been a "motivating purpose" of the Policy to protect particular cities or particular stadiums. *See* Mot. at 20 & n.13. The City ignores this point in its Opposition.

Brief, the factors are discretionary; at most the Policy provides that Defendants may consider them when exercising business judgment. The Complaint nowhere alleges that Defendants did not.

III. THE CITY'S REMAINING CLAIMS SHOULD BE DISMISSED.

The City asserts three additional claims that derive from the same alleged facts: a claim for declaratory relief (Count IV), a claim for quantum meruit (Count VI), and a claim for unjust enrichment (Count VII). All should be dismissed.

The City concedes that Count IV, its declaratory relief claim, can go forward only if it has successfully asserted other antitrust claims. Opp. at 16. For the reasons set forth above, it hasn't.

With respect to Count VI, the claim for quantum meruit, the City fails to respond to the authority cited in the Opening Brief for the proposition that quantum meruit is unavailable when there is a contract governing the same subject matter. *See* Mot. at 22 (citing *Hedging Concepts, Inc. v. First Alliance Mortg. Co.*, 41 Cal. App. 4th 1410, 1419 (1996)). Here, the City specifically alleges the existence of a lease agreement that governs the compensation the Raiders will pay for the use of the Oakland Coliseum. If the City believed that it needed to provide for a termination fee or other mechanism to compensate itself for stadium improvements not fully depreciated after the twenty-four years since the Raiders returned to Oakland, the lease was the place to do it.[10]

With respect to Count VII, for unjust enrichment, the City asks the Court to recast the claim as one arising in quasi-contract, *i.e.*, as a claim identical to the quantum meruit claim asserted in Count VI. *See, e.g. In re Vizio, Inc.*, 238 F. Supp. 3d 1204, 1233 (C.D. Cal. 2017). That is of no help to the City: it simply means the claim is defective for the same reason as Count VI, as well as duplicative.[11]

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[10] Notably, the complaint nowhere alleges that the Raiders have not fully performed under their lease.

[11] In the majority of the quasi-contract cases cited by the City, there was no actual contract governing the subject matter. *See In re Vizio, Inc.*, 238 F. Supp. at 1233 (claim that television set producers improperly collected personal data); *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (false labeling claim) (holding that "in California, there is not a standalone cause of action for 'unjust enrichment,' which is synonymous with restitution"); *Brazil v. Dole Packaged Foods, LLC*, 660 Fed. App'x 531 (9th Cir. 2016) (same); *Young v. Cree, Inc.* No. 17-cv-06252, 2018 WL 1710181, at *8 (N.D. Cal. Apr. 9, 2018) (same). In one of the cited cases, *McNeary-Calloway v. JP Morgan Chase Bank, N.A.*, 863 F. Supp. 2d 928, 963-64 (N.D. Cal. 2012), this Court declined to dismiss an unjust enrichment claim but noted uncertainty regarding "whether unjust enrichment may be asserted as a stand-alone claim under California law" and instead

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed. Furthermore, given the futility of the City's theories, leave to amend should be denied or, at a minimum the City should be required to file a separate motion for leave to amend to show specifically how amendment would cure the defects in the Complaint.

DATED: April 17, 2019. Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP
KENNETH G. HAUSMAN (Bar No. 57252)
kenneth.hausman@arnoldporter.com
DANIEL B. ASIMOW (Bar No. 165661)
daniel.asimow@arnoldporter.com
DAVID J. REIS (Bar No. 155782)
david.reis@arnoldporter.com
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Telephone: 415.471.3100
Facsimile: 415.471.3400

WILLIAM J. BAER (*pro hac vice*)
bill.baer@arnoldporter.com
JONATHAN I. GLEKLEN (*pro hac vice*)
jonathan.gleklen@arnoldporter.com
601 Massachusetts Ave, NW
Washington, D.C. 20001-3743
Telephone: 202.942.5000
Facsimile: 202.942.5999

By: /s/ *Daniel B. Asimow*
DANIEL B. ASIMOW

Attorneys for Defendant
THE OAKLAND RAIDERS

COVINGTON & BURLING LLP
JOHN E. HALL (Bar No. 118877)
jhall@cov.com
GREGG H. LEVY (*pro hac vice*)
glevy@cov.com
DEREK LUDWIN (*pro hac vice*)
dludwin@cov.com
BENJAMIN J. RAZI (*pro hac vice*)
brazi@cov.com
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
Telephone: 202.662.6000
Facsimile: 202.662.6291

By: /s/ *John E. Hall*
JOHN E. HALL

Attorneys for Defendants
THE NATIONAL FOOTBALL LEAGUE and all NFL clubs other than The Oakland Raiders

(Footnote Cont'd From Previous Page)
evaluated the claim as one for restitution. That decision pre-dated the Ninth Circuit's decision in *Asitana*, 783 F.3d at 762, clarifying that such restitution claims are actions in quasi-contract which cannot proceed when an express contract governs. *See Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal. App. 4th 194, 203 (1996) ("[I]t is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter.").

SIGNATURE ATTESTATION

I, Daniel B. Asimow, am the ECF user whose user ID and password are being utilized to electronically file this **Defendants' Reply Brief in Support of Motion to Dismiss**. Pursuant to Local Rule 5-1(i)(3), I hereby attest that the other signatory, John E. Hall, has concurred in this filing.

Dated: April 17, 2019.

ARNOLD & PORTER KAYE SCHOLER LLP

By: */s/ Daniel B. Asimow*
DANIEL B. ASIMOW

Attorneys for Defendant
THE OAKLAND RAIDERS